

Hon. Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SHANNON KAHN,

Plaintiff,

V.

TRANSFORCE, INC., d/b/a
TRANSFORCE GROUP, a foreign profit
corporation,,

Defendant.

No. 2:22-cv-01086-RSM

AGREEMENT REGARDING
DISCOVERY OF ELECTRONICALLY
STORED INFORMATION AND
ORDER

The parties hereby stipulate to the following provisions regarding the discovery of electronically stored information (“ESI”) in this matter:

A. General Principles

1. An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

2. As provided in LCR 26(f), the proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as possible.

1 **B. ESI Disclosures**2 Within 30 days of entry of this Order, or at a later time if agreed to by the parties,
3 each party shall disclose:4 1. Custodians. The five custodians most likely to have discoverable ESI in their
5 possession, custody, or control. The custodians shall be identified by name, title, connection
6 to the instant litigation, and the type of the information under the custodian's control.7 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g., shared
8 drives, servers), if any, likely to contain discoverable ESI.9 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to
10 contain discoverable ESI (e.g., third-party email providers, mobile device providers, cloud
11 storage) and, for each such source, the extent to which a party is (or is not) able to preserve
12 information stored in the third-party data source.13 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable
14 ESI (by type, date, custodian, electronic system or other criteria sufficient to specifically
15 identify the data source) that a party asserts is not reasonably accessible under Fed. R. Civ.
16 P. 26(b)(2)(B).17 5. Foreign data privacy laws. Nothing in this Order is intended to prevent either
18 party from complying with the requirements of a foreign country's data privacy laws, e.g.,
19 the European Union's General Data Protection Regulation (GDPR) (EU) 2016/679. The
20 parties agree to meet and confer before including custodians or data sources subject to such
21 laws in any ESI or other discovery request.22 **C. ESI Discovery Procedures**23 1. On-site inspection of electronic media. Such an inspection shall not be
24 required absent a demonstration by the requesting party of specific need and good cause or
25 by agreement of the parties.

1 2. Search methodology. The parties shall timely confer to attempt to reach
 2 agreement on appropriate search terms and queries, file type and date restrictions, data
 3 sources (including custodians), and other appropriate computer- or technology-aided
 4 methodologies, before any such effort is undertaken. The parties shall continue to cooperate
 5 in revising the appropriateness of the search methodology.

6 a. Prior to running searches:

7 i. The producing party shall disclose the data sources (including
 8 custodians), search terms and queries, any file type and date restrictions, and any other
 9 methodology that it proposes to use to locate ESI likely to contain responsive and
 10 discoverable information. The producing party may provide unique hit counts for each
 11 search query.

12 ii. The requesting party is entitled to, within 14 days of the
 13 producing party's disclosure, add no more than 10 search terms or queries to those disclosed
 14 by the producing party absent a showing of good cause or agreement of the parties.

15 iii. The following provisions apply to search terms / queries of
 16 the requesting party. Focused terms and queries should be employed; broad terms or
 17 queries, such as product and company names, generally should be avoided. A conjunctive
 18 combination of multiple words or phrases (e.g., "computer" and "system") narrows the
 19 search and shall count as a single search term. A disjunctive combination of multiple words
 20 or phrases (e.g., "computer" or "system") broadens the search, and thus each word or phrase
 21 shall count as a separate search term unless they are variants of the same word. The
 22 producing party may identify each search term or query returning overbroad results
 23 demonstrating the overbroad results and a counter proposal correcting the overbroad search
 24 or query. A search that returns more than 250 megabytes of data, excluding Microsoft
 25 PowerPoint files, audio files, and similarly large file types, is presumed to be overbroad.

1 b. After production: Within 21 days of the producing party notifying
2 the receiving party that it has substantially completed the production of documents
3 responsive to a request, the responding party may request no more than 10 additional search
4 terms or queries. The immediately preceding section (Section C(2)(a)(iii)) applies.

5 c. Upon reasonable request, a party shall disclose information relating to
6 network design, the types of databases, database dictionaries, the access control list and
7 security access logs and rights of individuals to access the system and specific files and
8 applications, the ESI document retention policy, organizational chart for information
9 systems personnel, or the backup and systems recovery routines, including, but not limited
10 to, tape rotation and destruction/overwrite policy.

11 3. Format.

12 a. ESI will be produced to the requesting party with searchable text, in a
13 format to be decided between the parties. Acceptable formats include, but are not limited to,
14 native files, multi-page TIFFs (with a companion OCR or extracted text file), single-page
15 TIFFs (only with load files for e-discovery software that includes metadata fields identifying
16 natural document breaks and also includes companion OCR and/or extracted text files), and
17 searchable PDF.

18 b. Unless otherwise agreed to by the parties, files that are not easily
19 converted to image format, such as spreadsheet, database, and drawing files, will be
20 produced in native format.

21 c. Each document image file shall be named with a unique number
22 (Bates Number). File names should not be more than twenty characters long or contain
23 spaces. When a text-searchable image file is produced, the producing party must preserve
24 the integrity of the underlying ESI, *i.e.*, the original formatting, the metadata (as noted
25 below) and, where applicable, the revision history.

1 d. If a document is more than one page, the unitization of the document
2 and any attachments and/or affixed notes shall be maintained as they existed in the original
3 document.

4 e. The parties shall produce their information in the following format:
5 single- page images and associated multi-page text files containing extracted text or with
6 appropriate software load files containing all information required by the litigation support
7 system used by the receiving party.

8 f. The full text of each electronic document shall be extracted
9 ("Extracted Text") and produced in a text file. The Extracted Text shall be provided in
10 searchable ASCII text format (or Unicode text format if the text is in a foreign language)
11 and shall be named with a unique Bates Number (*e.g.*, the unique Bates Number of the first
12 page of the corresponding production version of the document followed by its file
13 extension).

14 4. De-duplication. The parties may de-duplicate their ESI production across
15 custodial and non-custodial data sources after disclosure to the requesting party, and the
16 duplicate custodian information removed during the de-duplication process tracked in a
17 duplicate/other custodian field in the database load file.

18 5. Email Threading. The parties may use analytics technology to identify email
19 threads and need only produce the unique most inclusive copy and related family members
20 and may exclude lesser inclusive copies. Upon reasonable request, the producing party will
21 produce a less inclusive copy.

22 6. Metadata fields. If the requesting party seeks metadata, the parties agree that
23 only the following metadata fields need be produced, and only to the extent it is reasonably
24 accessible and non-privileged: document type; custodian and duplicate custodians (or
25 storage location if no custodian); author/from; recipient/to, cc and bcc; title/subject; email
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1 subject; file name; file size; file extension; original file path; date and time created, sent,
 2 modified and/or received; and hash value. The list of metadata type is intended to be flexible
 3 and may be changed by agreement of the parties, particularly in light of advances and
 4 changes in technology, vendor, and business practices.

5 7. Hard-Copy Documents. If the parties elect to produce hard-copy documents
 6 in an electronic format, the production of hard-copy documents will include a cross-
 7 reference file that indicates document breaks and sets forth the custodian or
 8 custodian/location associated with each produced document. Hard-copy documents will be
 9 scanned using Optical Character Recognition technology and searchable ASCII text files
 10 will be produced (or Unicode text format if the text is in a foreign language), unless the
 11 producing party can show that the cost would outweigh the usefulness of scanning (for
 12 example, when the condition of the paper is not conducive to scanning and will not result in
 13 accurate or reasonably useable/searchable ESI). Each file will be named with a unique Bates
 14 Number (*e.g.*, the unique Bates Number of the first page of the corresponding production
 15 version of the document followed by its file extension).

16 **D. Preservation of ESI**

17 The parties acknowledge that they have a common law obligation, as expressed in
 18 Fed. R. Civ. P. 37(e), to take reasonable and proportional steps to preserve discoverable
 19 information in the party's possession, custody, or control. With respect to preservation of
 20 ESI, the parties agree as follows:

21 1. Absent a showing of good cause by the requesting party, the parties shall not
 22 be required to modify the procedures used by them in the ordinary course of business to
 23 back-up and archive data; provided, however, that the parties shall preserve all discoverable
 24 ESI in their possession, custody, or control.

1 2. The parties will supplement their disclosures in accordance with Fed. R. Civ.
 2 P. 26(e) with discoverable ESI responsive to a particular discovery request or mandatory
 3 disclosure where that data is created after a disclosure or response is made (unless excluded
 4 under Sections (D)(3) or (E)(1)-(2)).

5 3. Absent a showing of good cause by the requesting party, the following
 6 categories of ESI need not be preserved:

- 7 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 8 b. Random access memory (RAM), temporary files, or other ephemeral
 data that are difficult to preserve without disabling the operating
 system.
- 9 c. On-line access data such as temporary internet files, history, cache,
 cookies, and the like.
- 10 d. Data in metadata fields that are frequently updated automatically, such
 as last-opened dates (see also Section (E)(5)).
- 11 e. Back-up data that are duplicative of data that are more accessible
 elsewhere.
- 12 f. Server, system or network logs.
- 13 g. Data remaining from systems no longer in use that is unintelligible on
 the systems in use.
- 14 h. Electronic data (*e.g.*, email, calendars, contact data, and notes) sent to
 or from mobile devices (*e.g.*, iPhone, iPad, Android devices), provided
 that a copy of all such electronic data is automatically saved in real
 time elsewhere (such as on a server, laptop, desktop computer, or
 “cloud” storage).

22 **E. Privilege**

23 1. A producing party shall create a privilege log of all documents fully withheld
 24 from production on the basis of a privilege or protection, unless otherwise agreed or
 25 excepted by this Agreement and Order. Privilege logs shall include a unique identification
 26 number for each document and the basis for the claim (attorney-client privileged or work-

1 product protection). For ESI, the privilege log may be generated using available metadata,
2 including author/recipient or to/from/cc/bcc names; the subject matter or title; and date
3 created. Should the available metadata provide insufficient information for the purpose of
4 evaluating the privilege claim asserted, the producing party shall include such additional
5 information as required by the Federal Rules of Civil Procedure. Privilege logs will be
6 produced to all other parties no later than 30 days after delivering a production unless an
7 earlier deadline is agreed to by the parties.

8 2. Redactions need not be logged so long as the basis for the redaction is clear
9 on the redacted document.

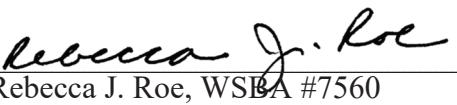
10 3. With respect to privileged or work-product information generated after the
11 filing of the complaint, parties are not required to include any such information in privilege
12 logs.

13 4. Activities undertaken in compliance with the duty to preserve information are
14 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

15 5. Pursuant to Fed. R. Evid. 502(d), the production of any documents in this
16 proceeding shall not, for the purposes of this proceeding or any other federal or state
17 proceeding, constitute a waiver by the producing party of any privilege applicable to those
18 documents, including the attorney-client privilege, attorney work-product protection, or any
19 other privilege or protection recognized by law. Information produced in discovery that is
20 protected as privileged or work product shall be immediately returned to the producing
21 party, and its production shall not constitute a waiver of such protection.

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23 DATED: November 17, 2022
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1 SCHROETER, GOLDFMARK & BENDER

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10 Attorney for Defendant

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ORDER

10 Based on the foregoing, IT IS SO ORDERED.
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DATED: January 13, 2023

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